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In the Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
PETITIONERS

v.

FRANK KUEHNER, ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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NO. 83-1593

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

FRANK KUEHNER, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Pursuant to Rule 22.6 of the Rules of this Court, respondents file this supplemental brief to respond to the supplemental brief filed by the Solicitor General on behalf of petitioners, in which the Solicitor General addressed the effect of the recently enacted Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 ("1984 Reform Act"), and requested that the Court vacate the judgment below and remand the case with certain instructions.

This is a class action filed on April 29, 1982, in the United States District Court for the Eastern District of Pennsylvania, against the Secretary of Health and Human Services (the "Secretary"), the Commissioner of Social Security, and two state officials responsible for administering Social Security disability claims under contract with the Secretary. The named plaintiffs represent a class consisting of all disability beneficiaries under Title II and Title XVI of the Social Security Act, 42 U.S.C. §§401 et seq., 1381 et seq., who reside in Pennsylvania, who have presented claims for continuing benefits, and who have been, are, or will be terminated from the disability benefit program. The case raises questions whether the Secretary has refused to follow controlling Third Circuit precedent in disability review proceedings by (among other things) determining that individual recipients are no longer disabled without finding that their medical condition has improved, without according substantial weight to the reports of treating physicians, and without evaluating pain, the combined effect of multiple impairments, or non-medical vocational factors.

The District Court dismissed respondents' complaint for lack of subject matter jurisdiction. It held that respondents could not obtain jurisdiction because not all class members had exhausted their administrative remedies. The Court of Appeals for the Third Circuit reversed, holding

that the District Court had failed to follow (or even to acknowledge) controlling precedent in the Third Circuit as to both the judicial review provisions of the Social Security Act, 42 U.S.C. §§ 405(g), 1383(c)(3), and the mandamus statute, 28 U.S.C. § 1361. Applying these precedents, the Court of Appeals found jurisdiction proper under either statute.

Respondents concur with the Solicitor General's evaluation that the 1984 Reform Act affects the proper disposition of this case by the Court. The 1984 Reform Act represents congressional rejection of a course of action by the Secretary since 1981 that has resulted in a rash of litigation and widespread criticism of the Social Security Administration. Without a single dissenting vote, Congress granted extraordinary relief to all named and unnamed members of classes certified prior to and pending on September 19, 1984, in "actions relating to medical improvement," see §2(d)(2), specified new standards for evaluations of medical improvement (§2(a)), pain (§3(a)), and multiple impairments (§4), and imposed a moratorium on eligibility reviews under the Secretary's current criteria for evaluating mental impairments (§5(b)).

With the 1984 Reform Act, Congress acted on behalf of those terminated and specifically resolved the question presented to this Court by the Solicitor General: whether members of this class were barred from further relief on account of their failure to exhaust fully their administrative

remedies under the Social Security Act. Senator Dole, who represented the Administration's interests in negotiations concerning final passage of the Act, stated: "[Section 2(d)] permit[s] all class members of certified class actions to seek review of their cases under the medical improvement standard establishment [sic] by this act, even when they may not have pursued their appeal rights in accordance with section [405] and the Secretary's regulations." 130 Cong. Rec. S11454 (daily ed. Sept. 19, 1984).[1]

Accordingly, no useful purpose would now be served by reconsideration of the judgment below in light of Heckler v. Ringer, No. 82-1772 (May 14, 1984), or by plenary Supreme Court proceedings on the question presented in the petition for certoriari. Respondents agree on the need for swift effectuation of the congressional mandate in the 1984 Reform Act.

Respondents respectfully differ, however, with the form of order suggested by the Solicitor General. See Supplemental Brief for Petitioners, at 11. Not only is there no need for this Court to order dismissal of the complaint, as requested by the Solicitor General, but such an order would bring with it the possibility of misinterpretation

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1. Congress' reasons for granting this special relief seem remarkably close to those expressed by Judge Becker in his concurring opinion in the Court of Appeals. Essentially, the extraordinary burden on the courts and individual recipients created by the Secretary's "non-acquiescence" policy made strict application of the general exhaustion requirements unfair. See 130 Cong. Rec. S11457 (daily ed. Sept. 19, 1984) (remarks of Sen. Levin); id. S11459-S11460 (remarks of Sen. Sasser); id. S11461 (remarks of Sen. Cohen); id. H9836 (remarks of Rep. Pickle); id. H9837-H9838 (remarks of Rep. Roybal).

and confusion in the District Court and in all other federal courts in which cases affected by the 1984 Reform Act are pending. Furthermore, the proposed instructions embody several disputed interpretations of the 1984 Reform Act, interpretations supported by only a few paragraphs of conclusory argument in the Solicitor General's brief. See id. at 9 n.9, 10-11. Rather than entering the order suggested by the Solicitor General, the Court should simply deny certiorari or, in the alternative, do no more than remand for further proceedings consistent with the 1984 Reform Act.[2]

The Supreme Court's practice of summarily granting a writ of certiorari, vacating the judgment below, and remanding with instructions is a powerful incident of its certiorari jurisdiction, and one that has received practically no comment in the Court's opinions or in the law review articles and treatises that have described the Court's practices. With a few, unexplained exceptions,[3] cases in which the Court has summarily instructed lower federal courts to dismiss a complaint fall exclusively into two categories: (1) cases which have become moot or have abated pending

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2. If the Court is determined to interpret the Act de novo in the Supreme Court, it should request that the parties brief the 1984 Act issues fully, thereby also providing the parties to other class actions affected by the Act notice of the Court's intent and an opportunity to present their views as amici.

3. E.g., Moore v. Black Panther Party, 458 U.S. 118 (1982) (no explanation); Washington v. United States, 357 U.S. 348 (1958) ("because of the insufficiency of the evidence").

disposition of a petition, see, e.g., United States v. Munsingwear, Inc., 340 U.S. 36, 41 (1950); United States ex rel. Norwegian Nitrogen Products Co. v. United States Tariff Commission, 274 U.S. 106, 11-112 (1927), or (2) cases in which a decision by the Supreme Court subsequent to the proceedings below has made clear that the plaintiffs had no right to relief, see, e.g., United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982) (disallowing interlocutory appeals of a motion to dismiss an indictment on vindictive prosecution grounds); Goldwater v. Carter, 444 U.S. 996 (1979) (plurality opinion) (complaint raised nonjusticiable political question); Grant v. United States, 369 U.S. 401 (1962) (following De Bella v. United States, 369 U.S. 121 (1962), which held that pre-indictment orders granting or denying the suppression of evidence were not appealable).

In this case, the 1984 Reform Act does not fully moot the controversy between respondents and petitioners, and the Solicitor General has implicitly conceded that a simple Munsingwear order is inappropriate.[4] At the very least, further proceedings in the District Court will clearly be necessary to give temporal definition to the broad class certified by the District Court, see p. 2, supra, to identify unnamed class members and to locate them, and to make certain the Secretary has provided adequate notice to the class. For

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4. Where a change in the law obviously moots the controversy between the parties, of course, the Court may instruct the lower courts to dismiss the complaint, as in a straight "Munsingwear" case. See, e.g., United States v. Hamburg-Amerikanische Gesellschaft, 239 U.S. 466 (1915). Cf. Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869) (withdrawal of jurisdiction).

some class members, the question will arise whether the Secretary should render a new decision or apply the "mental impairments" moratorium in §5 of the 1984 Reform Act. A number of respondents' claims have not been addressed by the new statute. See pp. 2-3, supra. Thus, while some of the specific issues raised in the proceedings below have been resolved by the 1984 Reform Act, at least some further proceedings must occur. In such cases of partial mootness, the Court has not ordered dismissal of the complaint. See, e.g., University of Texas v. Camenisch, 451 U.S. 390, 394 (1981).[5]

A change in statutory law while an appeal is pending presents different, although related, issues. In general, the Court has always considered itself bound to follow the new law, if it is applicable. See United States v. Schooner Peggy, 5 U.S. (1 Cranch.) 103, 109 (1801). The Court has three basic options in such a situation. It can make its own determination of the applicability and the effect of the new law, see, e.g., id.; Hines v. Davidowitz, 312 U.S. 52, 60 (1941). This may be done summarily or after

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5. In some cases of partial mootness, the Court has ordered dismissal of the complaint without prejudice to reinstitution of new proceedings to resolve the remaining issues. E.g., Alejandrino v. Quezon, 271 U.S. 528 (1926); United States v. Alaska S.S. Co., 253 U.S. 113 (1920); cf., O'Ryan v. Mills Novelty Co., 292 U.S. 609 (1934) (change in state law). If the Court adopts the Solicitor General's proposed order, it should modify the Order to specify that the case be discussed without prejudice.

argument specifically addressed to the change in law, see Carpenter v. Wabash Ry. Co., 309 U.S. 23 (1940). Second, it can determine whether the change in the law is relevant to the case before it, and, if so, remand for a determination by the lower courts as to the effect of the new law. See, e.g., Omaha National Bank v. Nebraskans for Independent Banking, 426 U.S. 310 (1976); Fusari v. Steinberg, 419 U.S. 379 (1975); Roth v. Delano, 338 U.S. 226, 231 (1949). Third, the Court can do nothing at all, provided that, given the procedural posture of the case, the parties remain able to address the change in the law in the lower courts.[6]

The choice among these three options depends upon the discretionary considerations that generally govern exercise of the Court's appellate jurisdiction. Two factors, however, predominate. First, the Court's goal has been "to make such disposition of the case as justice may at this time require." Watts, Watts & Co. v. Unione Austriaca, 284 U.S. 9, 21 (1918) (Brandeis, J.). A judgment in the lower court the substance or procedural effect of which is contrary to the new law must be vacated or reversed, even if it was correct when entered. Id.; Vandenbark v. Owens-Illinois Co., 311 U.S. 538, 543 (1941); Rafferty v. Smith, Bell & Co., 257 U.S. 226, 232 (1921). Therefore, by negative implication, certiorari may be denied if enforcement of the judgment below will lead to a result consistent with the new law. See Gulf, Col. & S.F. Ry. v. Dennis, 224 U.S. 503, 509 (1912).

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6. Because denials of certiorari are rarely explained, it is difficult to cite precedent for this theoretically obvious alternative.

Second, the Court must consider the quality of its decision, especially where the effect of the new law is not entirely clear, the lower courts have not had the opportunity to address the new law, and the Court has not had the advantage of briefing and argument on the issue. For that reason, although the Supreme Court clearly has the power to interpret new law de novo, it often declines to do so. With regard to changes in state law, the leading commentators on Supreme Court practice have observed:

> "The customary procedure of the Supreme Court . . . when its attention has been called to changes in state law supervening the judgment or decree under review, is to remand the cause for appropriate action by the state courts, a procedure which obviates the injustice which might occur if the Supreme Court closed its eyes to changes in state law, but which defers to the rule that questions of state law are primarily for the determination of state courts."

Robertson and Kirkham's Jurisdiction of the Supreme Court of the United States, § 89, at 161 n.3 (R. Wolfson & P. Kurland eds. 1951). There is an equivalent (if less strong) policy favoring initial consideration of federal law by the lower federal courts. Without a proper record, a lower court interpretation, and the opportunity to consider the new law in the context of more than a single case, the Supreme Court generally refuses (and ought to refuse) to create a precedent that may not be fully informed. See Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 677-679 (1950) (remanding to lower court for consideration of new federal issues raised by Supreme Court opinion).

The interests of justice require nothing more in this case than a simple, non-precedential denial of certiorari. While a judgment that leads to an incorrect result under current law cannot stand, Gulf, Col. & S.F. Ry., supra, and the Court attempts to prevent an unreviewable judgment from "spawning any legal consequences," see Goldwater v. Carter, supra, at 1006 (plurality opinion), permitting the judgment of the Court of Appeals to stand in this case presents neither danger. The result of the Court of Appeals' judgment, which merely upheld a jurisdiction that now clearly exists, is perfectly consistent with the 1984 Reform Act. A denial of certiorari will have the simple effect of returning the case to the District Court, which has a clear duty to give effect to the 1984 Reform Act, and where petitioners have every opportunity to advance their construction of the Act. And the judgment below will have no general precedential value, given the uniqueness of the facts upon which it was rendered--facts which inspired Congress to grant extraordinary relief--and given the Supreme Court's subsequent restatement of the first principles of Social Security Act exhaustion in Ringer.

In contrast, the form of order suggested by the Solicitor General is likely to cause confusion, both in the District Court hearing this case and in other federal courts. The Solicitor General's proposed order--precisely because it

so resembles a Munsingwear order--may be misinterpreted as implying that the lower courts no longer have jurisdiction to resolve the issues necessary to effect the remand required by the 1984 Reform Act. Given the potential difficulty of fixing class membership in this and other cases, such a misinterpretation would produce havoc.[7]

With regard to the second discretionary factor, the Solicitor General's proposed order embodies several controversial interpretations of the 1984 Reform Act, which the Court should not adopt summarily.[8] When District Courts remand disability cases to the Secretary for a new determination of eligibility for benefits, the consistent practice, as reflected in the statute, has been for the courts to retain jurisdiction over the case until the administrative process has been completed. 42 U.S.C. §405(g); See, e.g., Zambrana v. Califano, 651 F.2d 842, 844 (2d Cir. 1981); Good v. Weinberger, 389 F.Supp. 350 (W.D. Pa. 1975).

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7. Furthermore, by vacating the Court of Appeals' judgment, the Supreme Court might cast doubt on respondents' entitlement to a 1984 Act remand, despite Congress' clear intent to provide such relief. Respondents' class claim was pending on September 19, 1984, only by reason of the Court of Appeals' judgment reversing the District Court's dismissal of the case. While vacating the Court of Appeals' judgment would not necessarily mean that respondents are not entitled to relief under the 1984 Act, it could be so interpreted.

8. For the Court to adopt the proposed order, it would necessarily have to adopt the Solicitor General's interpretation, and its decision would be binding precedent in every case affected by the Act. While a denial of certiorari has no precedential effect, see Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950) (opinion of Frankfurter, J.), a summary grant of certiorari and disposition of the appeal creates precedent.

Congress did not likely intend that entirely different procedures be applied to remands under the 1984 Reform Act. Furthermore, the Solicitor General seems to take the view that the Secretary alone should determine which persons are entitled to relief as unnamed class members and what steps should be taken if--for instance--a substantial number of certified letters cannot be delivered. Ordinarily, however, the District Court that certified the class would resolve such questions. It is also not clear that all members of this class and other classes whose benefits were denied on non-"medical improvement" grounds should be denied the opportunity to proceed in federal court, especially if (as, for instance, with regard to pain) the 1984 Reform Act's standards are less favorable than previously controlling law in a particular Circuit.[9]

Before adopting the Solicitor General's reading of the Act, with no record and no lower court consideration of the question, the Court should at least request further briefing addressed to this issue, or even hear argument on the question as in Carpenter. The circumstances of this case, however, do

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9. In such cases, the Solicitor General's suggestion that the 1984 Reform Act has withdrawn jurisdiction from the federal courts altogether without furnishing an equivalent remedy raises a serious question under the Due Process Clause. See generally Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953). The problem is further complicated by the fact that the precise standards under the new Act will not be clear until the Secretary has completed the rulemaking required by the Act.

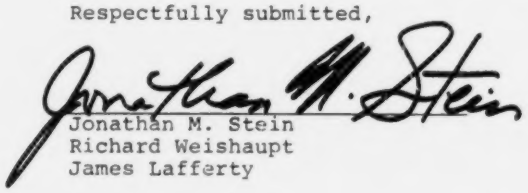
not require that this Court receive further briefs, hear argument, or even concern itself with the issues raised by the Act. Such issues, while presently of great importance to members of certified classes in Social Security Act disability cases, are strictly ephemeral in that they require technical construction of a single piece of special legislation, they will necessarily be resolved within the coming months by courts throughout the federal system, and they will not thereafter reoccur. In short, the questions now presented by this case do not require immediate resolution by the Supreme Court, nor would they be "certworthy" if presented on petition from a Court of Appeals.

Therefore, the Court should deny the writ of certiorari and leave first-instance interpretation of the 1984 Reform Act to the District Court. If, however, the Court determines that it must take some action, it should remand the case to the District Court "for further proceedings consistent with" the 1984 Reform Act, rather than adopting the Solicitor General's more directive proposal. Cf. Omaha National Bank, supra (remand "for reconsideration in light of" new statute). In no event should the Court accept the Solicitor General's invitation to create binding precedent on the merits of the 1984 Reform Act without requesting additional briefing from the parties on the precise procedural steps that the statute requires in the circumstances of this case.

Conclusion

Respondents respectfully suggest that the writ of certiorari be denied or, in the alternative, that the Court remand the case to the District Court "for proceedings consistent with the Social Security Disability Benefits Reform Act of 1984."

Respectfully submitted,



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October 24, 1984